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Refining Advertisements of the Canadian Tar Sands

Rebecca Kim*

What most Americans don't know is that for the last seven years, Canada has been the number one supplier of oil to the United States. . . .

They don't know that a forest the size of Florida will be industrialized by this operation. They have no idea that it will be coming from some of the world's largest open pit mines. They have no idea that it's coming from operations that are creating three times more carbon emissions than conventional oil. And although a lot of Americans would find it comforting to know that they are no longer dependent on hostile suppliers of oil from the Middle East, they don't know . . . that a sacrifice zone the size of Florida has been created for the United States so the United States will have some degree of oil security for the next ten years.¹

INTRODUCTION

While many Americans have heard of the economic, national security, and climate change concerns associated with fossil fuels, few are familiar with the oil source that implicates those concerns the most. Tar sands are an unconventional oil source just north of the Canada-United States border that activists have criticized for threatening the environment and public health in unprecedented ways. However, when activists in Canada voiced their concerns to the public, stakeholders—tar sands producers and their supporters—pushed back through advertising.

This article explores the implications of that action and argues that regulations should be imposed on tar sands advertisements to prevent

* Thank you to Tristan Jones for inspiring me to write about the tar sands and Professor Robert Cumbow for his guidance and advice on this article.

¹ DIRTY OIL (Leslie Iwerks Productions 2009).

stakeholders from acting unfairly in their attempt to win the public's opinion about unconventional oil. In part I, I present background information on tar sands and evidence of the risks tar sand operations pose to the environment and the public. In part II, I present an example of controversial tar sands advertising in Canada that has been criticized for making the public think that tar sands are less environmentally damaging than they actually are. Although not published in the United States, for the purposes of this paper, I use these advertisements as a case study of potentially deceptive tar sands advertising. In part III, I evaluate the potential of the Federal Trade Commission Act and state and federal case law to regulate these ads. In part IV, I conclude that the passage of new legislation, informed by existing laws that regulate advertising of other hazardous products, is the best way to help Americans get a clear picture of this controversial fuel.

I. WHAT ARE TAR SANDS, AND WHY SHOULD WE WORRY ABOUT THEM?

Tar sands, also known as oil sands, are a mixture of sand, clay, water, and bitumen, a highly viscous form of oil.² The largest deposits of tar sands are found in Canada, in the Athabasca tar sands of northeast Alberta.³

In 2002, Canada became the largest foreign supplier of oil to the United States because of the oil extracted from tar sands.⁴ The energy consulting firm HS Cambridge Energy Research Associates estimated that Canadian tar sands would become America's top source of imported oil in 2010, thus surpassing conventional Canadian oil exports and roughly equaling the

² *Tar Sands Basics*, 2012 OIL SHALE & TAR SANDS PROGRAMMATIC EIS, <http://ostseis.anl.gov/guide/tarsands/index.cfm> (last visited Apr. 28, 2012) [hereinafter *About Tar Sands*].

³ *Alberta Oil Sands*, ALTA. GEOLOGICAL SURVEY, http://www.ags.gov.ab.ca/energy/oilsands/alberta_oil_sands.html (last visited Apr. 22, 2012).

⁴ ANDREW NIKIFORUK, *TAR SANDS: DIRTY OIL AND THE FUTURE OF A CONTINENT* 30 (2008) [hereinafter NIKIFORUK, *DIRTY OIL*].

combined oil exports from Saudi Arabia and Kuwait.⁵ The report noted that political uncertainty in the Middle East and reduced drilling permits in the gulf helped the Canadian tar sands grow “from being a fringe energy source to being one of strategic importance” over the last decade.⁶

Tar sands are extracted from the earth through mining and “in-situ,” or in place, techniques. About 20 percent of the tar sands in Alberta are shallow enough to be dug out of open-pit mines.⁷ The labor-intensive process requires removal of the overlaying forest before the tar sands can be excavated. After the tar sands are transported and arrive at a processing facility, hot water is used to separate the bitumen from the sand and clay. Open-pit mining requires approximately twelve barrels of hot water to separate enough bitumen to fill one barrel.⁸ In-situ techniques are needed to excavate the remaining 80 percent of tar sands, which lie even deeper within the earth and require a more energy-intensive method of using natural gas⁹ to boil water to separate the bitumen.¹⁰ The water leftover from the separation process includes traces of salt and chemicals hazardous to human health (such as phenols, benzene, cyanide, and heavy metals) and is stored in man-made storage facilities in the ground called “tailings ponds.”¹¹

Oil derived from tar sands has been called “dirty” because the “lifecycle” greenhouse gas emissions—the collective emissions released over the course of production, transport, refining, and ultimately consumption—

⁵ Clifford Krauss & Elisabeth Rosenthal, *Reliance on Oil Sands Grows Despite Environmental Risks*, N.Y. TIMES, May 18, 2010, http://www.nytimes.com/2010/05/19/business/energy-environment/19sands.html?_r=1&ref=oil_sands.

⁶ *Id.*

⁷ NIKIFORUK, DIRTY OIL, *supra* note 4, at 10, 13.

⁸ Andrew Nikiforuk, *The Tar Sands' Deadly Ponds*, CORP. ETHICS INT'L, <http://corpethics.org/article.php?id=2659> (last visited Apr. 22, 2012).

⁹ NIKIFORUK, DIRTY OIL, *supra* note 4, at 67.

¹⁰ *See id.* at 68.

¹¹ *Id.* at 78–79.

exceeds conventional oil.¹² Even the most conservative estimates approximate that a barrel of tar sands crude oil produces 17 percent more emissions over its lifetime than a barrel of conventional oil.¹³ In a letter to the Secretary of State in 2010, the EPA estimated that, from well to tank, greenhouse gas emissions from Canadian oil sands crude were approximately 82 percent greater than US “average” crude.¹⁴ Additionally, in a 2009 investigative report on oil sands production produced by the Council on Foreign Relations, energy security and climate change scholar Michael Levi predicted that if Canadian tar sands production increases as expected, the output of greenhouse gases by tar sands will roughly triple by 2030.¹⁵ If other emissions also drop as expected, tar sands emissions could constitute ten percent of U.S. emissions by 2050.¹⁶

Opponents of tar sands development are apprehensive not only about the potential impact on climate change, but also about the threats tar sand development poses to public health, particularly by contaminating sources of drinking water. In Alberta, tailings ponds have been estimated to leak fourteen human carcinogens and fish killing acids into the Athabasca River at a rate of up to eighteen gallons per second.¹⁷ The former chief of the local Mikisew Cree First Nation in the Northeastern Alberta Region, where the majority of people rely on traditional diets like moose, voiced his concern that the leaked chemicals would “affect anybody or anything that relies on water as a source of drinking or a place to live in [including fish, moose,

¹² MICHAEL A. LEVI, COUNCIL ON FOREIGN RELATIONS, THE CANADIAN OIL SANDS: ENERGY SECURITY VS. CLIMATE CHANGE 23 (May 2009), *available at* http://i.cfr.org/content/publications/attachments/Oil_Sands_CSR47.pdf.

¹³ *Id.*

¹⁴ Letter from The U.S. Env'tl. Prot. Agency to Jose W. Fernandez, Assistant Sec'y of the U.S. Dep't of State 2 (July 16, 2010), *available at* [http://yosemite.epa.gov/oeca/webeis.nsf/%28PDFView%29/20100126/\\$file/20100126.PDF](http://yosemite.epa.gov/oeca/webeis.nsf/%28PDFView%29/20100126/$file/20100126.PDF).

¹⁵ LEVI, *supra* note 12, at 25.

¹⁶ *Id.*

¹⁷ NIKIFORUK, DIRTY OIL, *supra* note 4, at 82–83.

and birds].”¹⁸ The potency of the toxins in these ponds was revealed to the world when, in the spring of 2008, five hundred ducks landed on a tailings pond maintained by the Canadian oil company Syncrude, and all five hundred died.¹⁹ Then, in 2006, Dr. John O’Connor raised concerns about the potential effect of tar sands toxins on the health of his patients in Fort Chipewyan, a small town located on the Athabasca River, downstream from the Alberta tar sands.²⁰ O’Connor reported that the residents suffered from high rates of rare cancers and chronic disorders such as renal failure and hyperthyroidism, which other studies had linked to chemicals found in tailings ponds.²¹

Data on the full effects of tailings pond toxins on human health are limited because the Canadian government has not conducted reviews to determine how much the chemicals seep into groundwater and rivers.²² Additionally, no entity has ever performed baseline studies to measure the quality of groundwater, air quality, or public health prior to tar sands production, making it difficult to assess the extent to which tar sands caused present day conditions.²³ However, another study of Fort Chipewyan residents provides an additional reason to worry that tar sands impact human health. In August 2007, the Alberta Cancer Board released its findings from a twelve-year investigation that used guidelines from the US Centers for Disease Control and Prevention to monitor and compare cancer cases in Fort Chipewyan to the number of cases expected over the period.²⁴ The study found that Fort Chipewyan residents had statistically significant

¹⁸ David J. Tenenbaum, *Oil Sands Development: A Health Risk Worth Taking?*, 117 ENVTL. HEALTH PERSPECTIVES 151 (2009).

¹⁹ NIKIFORUK, DIRTY OIL, *supra* note 4, at 77.

²⁰ KEVIN P. TIMONEY, NUNEE HEALTH BOARD SOCIETY, A STUDY OF WATER AND SEDIMENT QUALITY AS RELATED TO PUBLIC HEALTH ISSUES, FORT CHIPEWYAN, ALBERTA 6 (2007).

²¹ NIKIFORUK, DIRTY OIL, *supra* note 4, at 89.

²² *Id.* at 92.

²³ DIRTY OIL, *supra* note 1.

²⁴ Tenenbaum, *supra* note 18, at 153.

higher incidences of cancers of the blood and lymphatic system, biliary tract, and soft tissue, as well as higher instances of all other cancers combined.²⁵ The authors did not investigate whether the increased incidence of cancer was linked to tailings pond toxins, but they did report that the numbers had risen during the second half of the study period.²⁶

It is important for Americans to be aware of the concerns over tar sands in Canada because those concerns have become our own. For some US policymakers, tar sands are a way to help gain energy independence from unstable sources overseas.²⁷ In 2006, the US Energy Secretary declared that “the hour of the Oil Sands has come” as he announced the development of twenty-two pipelines, thirty-four natural gas pipelines, and ninety-one electric transmission lines bringing Canadian tar sands into the United States.²⁸ That number has since expanded, and the proposed “Keystone XL” pipeline by Canadian company TransCanada would nearly double the United States’ current capacity to import bitumen for processing by US refineries.²⁹ On January 18, 2012, President Obama agreed with the State Department’s recommendation to deny granting a permit for the pipeline because the Department needed more time to assess whether the project, in its current routing, “is in the national interest.”³⁰ However, an altered

²⁵ *Id.*

²⁶ *Id.* at 154.

²⁷ Krauss & Rosenthal, *supra* note 5. David L. Goldwyn, coordinator for international energy affairs at the State Department, stated that “[i]t is undeniable that having a large supply of crude oil available by pipeline from a friendly neighbor is extremely valuable to the energy security of the United States.” *Id.*

²⁸ NIKIFORUK, *DIRTY OIL*, *supra* note 4, at 33.

²⁹ Elisabeth Rosenthal, *Clinton Facing Heat on Oil Sands Pipeline*, N. Y. TIMES, Nov. 1, 2010, <http://green.blogs.nytimes.com/2010/11/01/clinton-facing-heat-on-oil-sands-pipeline/>.

³⁰ Brian Montopoli, *Obama Denies Keystone XL Pipeline Permit*, CBS NEWS, Jan. 18, 2012, http://www.cbsnews.com/8301-503544_162-57361324-503544/obama-denies-keystone-xl-pipeline-permit/.

version of the pipeline could still be approved because TransCanada is free to apply for another permit that proposes an alternate route.³¹

A joint report by the National Resources Defense Council, National Wildlife Federation, and Pipeline Safety Trust reported that transporting the crude bitumen through pipelines to refineries in the United States has its own safety risks.³² Tar sands pipelines must be operated at a higher temperature and pressure than pipelines transporting conventional crude oil because of the high viscosity and acidity of bitumen blends, creating an increased risk of corrosion that could cause pipelines to leak or rupture.³³

In addition, Americans in some parts of the country could soon feel the impacts of local tar sands mining. An estimated 12 to 19 billion barrels of tar sands exist under public lands in eastern Utah.³⁴ This resource has long remained untouched, but in September 2010, Utah's Division of Oil, Gas and Mining approved the United States' first commercial tar sands project.³⁵ The project will be operated by Canadian-based Earth Energy Resources and will draw from the Colorado River watershed.³⁶ In light of the Fort Chipewyan studies, the potential gains may be negligible compared to the potential risk to the water supply and the communities that depend on it; according to John Weisheit, Colorado Riverkeeper and Conservation Director of Living Rivers, "[t]he total amount of oil produced by this mine over seven years of operation would cover just seven hours of American oil

³¹ *Id.*

³² NAT'L RES. DEF. COUNCIL ET AL., TAR SANDS PIPELINE SAFETY RISKS 6 (Feb. 2011), <http://www.nrdc.org/energy/files/tarsandssafetyrisks.pdf>.

³³ *Id.*

³⁴ *About Tar Sands*, *supra* note 2.

³⁵ Travis Walter Donovan, *Utah Oil Sands: Canada's Infamous Tar Sands Extraction Coming to U.S.*, HUFFINGTON POST, Sept. 14, 2010, http://www.huffingtonpost.com/2010/09/14/utah-oil-sands-canadas-infamous_n_716225.html.

³⁶ *Id.*

demand—a tiny blip on the radar. However, it will take millennia to restore the watershed they are about to destroy.”³⁷

II. ISSUES SURROUNDING ADVERTISING IN DEFENSE OF TAR SANDS

As public concern grew in Canada about the “dirtiness” of tar sands, entities with a stake in the success of the tar sands industry, such as Shell International and representatives of the Albertan government,³⁸ made an effort to use advertisements to rebut those allegations. Rather than appease activists’ concerns, however, some of those efforts attracted new allegations of wrongdoing: “greenwashing” the tar sands’ image.³⁹ In this section, I will provide some explanation of what greenwashing is, review its relevance in the context of tar sands, and, finally, review a series of tar sands advertisements that have been accused of intentionally misleading the public.

Greenwashing has no single definition, but it has been described as “the act of misleading consumers regarding the environmental practices of a company or the environmental benefits of a product or service,”⁴⁰ and as “the increasingly common corporate practice of making dubious environmental claims that are more about marketing than saving the planet.”⁴¹ In a report titled “The Seven Sins of Greenwashing,” researchers

³⁷ *Id.*

³⁸ Because Issues of governmental immunity are beyond the scope of this article, I will not be analyzing the allegedly deceptive claims made by the Albertan government.

³⁹ See, e.g., Mike Hudema, *Put a CAPP on Tar Sands Greenwashing*, GREENPEACE, Nov. 23, 2010, <http://www.greenpeace.org/canada/en/Blog/put-a-capp-on-tar-sands-greenwashing/blog/28380>; Chris MacDonald, *Greenwashing the Tar Sands*, BUS. ETHICS BLOG, May 13, 2010, <http://businessethicsblog.com/2010/05/13/greenwashing-the-tar-sands/>.

⁴⁰ TERRACHOICE ENVTL. MKTG., THE SEVEN SINS OF GREENWASHING: ENVIRONMENTAL CLAIMS IN CONSUMER MARKETS 1 (Apr. 2009), available at <http://sinsofgreenwashing.org/findings/greenwashing-report-2009/>.

⁴¹ Dan Mitchell, *Blogging Against Barbie*, N.Y. TIMES, May 10, 2008, <http://www.nytimes.com/2008/05/10/technology/10online.html>.

studied environmental claims on 2,219 products in major big box retailers and found that over 98 percent carried the risk of misleading customers.⁴² The report classified misleading claims into seven categories of greenwashing “sins,” with perhaps the most relevant to tar sands advertising being the “sin of no proof”: making environmental claims about a product without a foundation in scientific evidence.⁴³

However much critics disparage greenwashing, the closest the Federal Trade Commission (FTC) has come to addressing the practice is producing the “Guides for the Use of Environmental Marketing Claims,” also known as “Green Guides.”⁴⁴ These guidelines apply to “environmental claims included in labeling, advertising, promotional materials and all other forms of marketing.”⁴⁵ For example, the FTC addresses the concern behind the “sin of no proof” with its guideline that “any party making an express or implied claim that presents an objective assertion about the environmental attribute of a product, package or service must, at the time the claim is made, possess and rely upon a reasonable basis substantiating the claim.”⁴⁶ As the word “Guides” indicates, however, the Green Guides only exist to help companies making environmental marketing claims to avoid violating the FTC Act.⁴⁷ The Green Guides are not enforceable regulations and lack the force and effect of law, so compliance with them is voluntary.⁴⁸

⁴² TERRACHOICE ENVTL. MKTG., *supra* note 40, at i.

⁴³ *Id.* at 3.

⁴⁴ *Reporter Resources: The FTC’s Green Guides*, FED. TRADE COMM’N, <http://www.ftc.gov/opa/reporter/advertising/greenguides.shtml> (last modified Feb. 22, 2012).

⁴⁵ Elizabeth K. Coppolecchia, *The Greenwashing Deluge: Who Will Rise Above the Waters of Deceptive Advertising?*, 64 U. MIAMI L. REV. 1353, 1365 (2010).

⁴⁶ 16 C.F.R. § 260.5 (2010).

⁴⁷ FED. TRADE COMM’N, ANNUAL REPORT OF THE FED. TRADE COMM’N, 1, 13 (1992), available at <http://www.ftc.gov/os/annualreports/ar1992.pdf>.

⁴⁸ See 16 C.F.R. § 260.2 (2012) (“Because the guides are not legislative rules under Section 18 of the FTC Act, they are not themselves enforceable regulations, nor do they have the force and effect of law.”).

Although advertisements about tar sands have yet to aggressively target consumers in the United States, they may be on the horizon as the controversy surrounding tar sands becomes more mainstream. The extension of the Keystone XL pipeline, which is currently slated to run from Alberta to refineries in the Midwest and down to Texas, will literally bring the tar sands closer to home for the Americans living in those regions.⁴⁹ In 2010, increased publicity of the development of the Keystone XL and other pipelines carrying extracted bitumen from Canada into the United States generated many grassroots protests from the communities through which the lines were planned to pass.⁵⁰ For example, one citizen living near a refinery being expanded to process bitumen transported through the Keystone pipeline explained that he was protesting because the “tar sands refinery brings illness for miles around, along with stress for residents who are watching it being built.”⁵¹ In November 2010, eleven US Senators responded to the public outcry and sent a letter to Secretary of State Hillary Clinton urging her to reject the expansion permit, in part because it would involve increased output from Canada’s tar sands into the US.⁵² As the letter stated, “We believe the Department of State (DOS) should not pre-

⁴⁹ *Keystone Gulf Coast Expansion Project (Keystone XL)*, DOWNSTREAM TODAY, http://www.downstreamtoday.com/projects/project.aspx?project_id=121&AspxAutoDetectCookieSupport=1 (last modified Sept. 13, 2010).

⁵⁰ John S. Adams, *Protests spew over Montana-Gulf pipeline plan*, USA TODAY, Aug. 11, 2010, http://www.usatoday.com/money/economy/2010-08-11-pipeline11_ST_N.htm; Hillary Brenhouse, *Canada’s Oily Sands Yield Energy and Protests*, N.Y. TIMES, Oct. 11, 2010, <http://www.nytimes.com/2010/10/12/business/energy-environment/12iht-rendsands.html?pagewanted=all>.

⁵¹ Gabriel DeRita, *Citizens Profiled in New Sierra Club Report Protest the Keystone XL Across the Country*, SIERRA CLUB COMPASS, Nov. 22, 2010, <http://sierraclub.typepad.com/compass/2010/11/new-sierra-club-report-protest-the-keystone-xl-across-the-country.html>.

⁵² Kate Sheppard, *Senators Protest Proposed Pipeline*, MOTHER JONES, Nov. 1, 2010, <http://motherjones.com/blue-marble/2010/11/senators-protest-proposed-pipeline>.

judge the outcome of what should be a thorough, transparent analysis of the need for this oil and its impacts on our climate and clean energy goals.”⁵³

In July 2010, the Albertan government, which would benefit economically from construction of the pipeline, responded to the controversy by advertising in the *Washington Post*.⁵⁴ After having his letter rejected from the *Post*'s opinion pages,⁵⁵ Alberta Premier Ed Stelmach purchased a \$55,800 advertisement that called the tar sands “a safe, reliable and responsible energy [source].”⁵⁶ The Premier's spokesman characterized the advertisement as countering inaccurate information about tar sands, “to get out some factual information.”⁵⁷

To this author's knowledge, oil companies have yet to specifically advertise about tar sands in the United States, but trends in tar sands advertising in Canada suggest what we could expect in the future. In April 2011, the Canadian Association of Petroleum Producers (CAPP) released an advertising campaign that attempted to put a friendly face on the tar sands operations. The advertisements featured representatives of oil companies testifying about their employers' efforts to lower the industry's impact on the environment, backdropped by natural scenery.⁵⁸

Greenpeace Canada pilloried the CAPP ads as “a huge publicity campaign to make the tar sands look better” rather “than actually address

⁵³ *Id.*

⁵⁴ Mitchell Anderson, *Ed Stelmach's Clumsy American Romance*, TYEE, Jul. 7, 2010, <http://theyee.ca/Opinion/2010/07/07/StelmachsClumsyRomance/>.

⁵⁵ Sarah O'Donnell, *Alberta Buys Ad after Washington Post Rejects Oilsands Pitch*, EDMONTON J., Jul. 2, 2010,

http://www.montrealgazette.com/story_print.html?id=3227215&sponsor=.

⁵⁶ Ed Stelmach, Advertisement, WASH. POST (Jul. 2, 2010), available at <http://edmonton.ctv.ca/pdfs/WashingtonPost.pdf>.

⁵⁷ *Alberta Buys \$56K Ad in U.S. Paper*, CBC News Calgary, Jul. 2, 2010, <http://www.cbc.ca/news/canada/calgary/story/2010/07/02/edmonton-alberta-premier-letter-washington-post-oilsands.html>.

⁵⁸ CANADIAN ASS'N OF PETROLEUM PRODUCERS, DIALOGUES: REPORT OF THE DIALOGUES ON THE OIL SANDS (Apr. 2011), <http://www.capp.ca/oilsands/ads/Pages/default.aspx#dasKCcNv68pB>.

the pressing environmental and human rights atrocities caused by tar sands development.”⁵⁹ This criticism applies equally to a series of full-page newspaper features financed by Shell International that were published in six major Canadian newspapers owned by Canwest corporation (hereafter the “Canwest advertisements”).⁶⁰ Each installment described Shell’s tar sands operations and how Shell was working to develop “cleaner fuels that contribute to improving air quality.”⁶¹ The advertisements were laid out and by-lined in a similar fashion as the rest of the paper, so it was not necessarily obvious to the reader that they were advertisements and not articles. The advertisements were attributed to Brian Burton, who had written the pieces as a freelancer for Canwest corporation.⁶² Additionally, they were titled “New Energy Future: The Energy Challenge and Environmental Responsibility” and subtitled “[a] six-week Canwest special information feature on climate change, in partnership with Shell Canada.”⁶³

⁵⁹ Hudema, *supra* note 39.

⁶⁰ *Shell Canada’s Disguised Advertising Techniques Can’t Hide the Truth about the Tar Sands*, SIERRA CLUB CANADA, <http://www.sierraclub.ca/en/tar-sands/media/release/shell-canada%E2%80%99s-disguised-advertising-techniques-can%E2%80%99t-hide-truth-about-tar-s> (last visited Apr. 22, 2012) [hereinafter *Disguised Advertising*]. The articles in question appeared in print and online on Saturday, January 23, 2010; Saturday, January 30, 2010; and Saturday, February 6, 2010. *Id.* As far as I know, there have not been similar advertisements published in the United States. However, for the purpose of this paper, I would like to evaluate how they would be treated under US law if they had in fact been released in the United States. With the current trajectory of oil sands development in the United States, it may only be a matter of time before the oil sands industry feels pressure to defend its practices in the United States in a similar way.

⁶¹ *Id.*

⁶² Dana Lacey, *Sierra Club Files Complaint Against Canwest for Oil Advertorials*, CANADIAN JOURNALISM PROJECT, Jul. 21, 2010, http://j-source.ca/english_new/detail.php?id=5386.

⁶³ *Sierra Club Canada Submits Shell Advertisement Complaint to Press Council*, SIERRA CLUB CANADA, <http://www.sierraclub.ca/en/tar-sands/media/release/sierra-club-canada-submits-shell-advertisement-complaint-press-council> (last visited Apr. 22, 2012) [hereinafter *Advertisement Complaint*].

Similar to the CAPP ads, each “information feature” of the Canwest advertisements profiled an employee who shared his or her positive impression of tar sands from working in the industry. Several of the pieces also included “Myth Busters” that seemed to debunk common misconceptions about tar sands production. For example:

MYTH BUSTER

MYTH: Shell’s oil sands mining operations are polluting the Athabasca River.

REALITY: Shell staff chemist Brad Komishke says this belief overlooks oil sands geology. Despite the fact oil sands have been leaching naturally into the river for the past 10,000 years, Shell ensures its operations don’t add a drop to that. “We contain all the process water and rain water on our sites to make sure they don’t flow into the river.”⁶⁴

MYTH BUSTER

MYTH: Oil sands production is too energy-intensive.

REALITY: The amount of natural gas (the primary energy source) used to produce a barrel of oil sands synthetic crude equates to 10 per cent of the energy contained in that barrel. Even so, energy-reduction measures are a key focus for technological investment at Shell.⁶⁵

Sierra Club Canada strongly criticized the Canwest ads for not making it clear that they were advertisements and thereby misleading readers into

⁶⁴ Brian Burton, *Shell Innovation Unlocks Oil Sands*, CANWEST NEWS SERVICE, Jan. 29, 2010 (on file with author).

⁶⁵ Brian Burton, *Climate Change: A Reality Check*, CANWEST NEWS SERVICE (Jan. 13, 2010), available at http://www-static.shell.com/static/can-en/downloads/media/2010/heavy_oil_series_jan_ertel.pdf [hereinafter Burton, *Climate Change*].

thinking they were journalistic pieces.⁶⁶ One online author commented more directly on the content of the advertisements, simply calling them “greenwash [of] the tar sands business.”⁶⁷

Corporate greenwashing, however, is not new to the petroleum industry. For instance, BP’s advertised commitment to environmental safety faced serious accusations of greenwashing following the 2005 explosion at its Texas refinery, the 2006 oil spill from its Alaskan pipeline,⁶⁸ and especially its 2010 rebranding from “British Petroleum” to “Beyond Petroleum.”⁶⁹ The BP remarketing was so successful that it won two PRWeek “Campaign of the Year” awards and a gold “Effie” award from the American Marketing Association.⁷⁰ In an article about greenwashing in corporate America, Jacob Vos observed that oil companies have tried to position themselves “as part of the solution to energy problems rather than the cause. . . . Many suggest . . . [that] in an effort to appear socially grounded, corporations have engaged in “greenwashing” or promoting a false (or factually unsupported) image of social responsibility.”⁷¹

There are a number of justifications for ensuring the public has a transparent view of tar sands unclouded by greenwashing advertisements. First, consumers of energy sources like oil are uniquely vulnerable to greenwashing because they are unable to personally test and verify the

⁶⁶ *Advertisement Complaint*, *supra* note 63.

⁶⁷ Raina Delisle, *How Canwest Helped Shell Oil Greenwash Its Tar Sands Business*, THIS MAGAZINE, Sept. 7, 2010, <http://this.org/magazine/2010/09/07/canwest-shell-advertorial>.

⁶⁸ Michael R. Siebecker, *Trust & Transparency: Promoting Efficient Corporate Disclosure Through Fiduciary-based Disclosure*, 87 WASH. U. L. REV. 115, 133 (2009).

⁶⁹ Anne Landman, *BP’s “Beyond Petroleum” Campaign Losing its Sheen*, PRWATCH, May 3, 2010, <http://www.prwatch.org/node/9038>.

⁷⁰ Chrystia Freeland, *What’s BP’s Social Responsibility?*, WASH. POST, Jul. 18, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/07/16/AR2010071604070.html>.

⁷¹ Siebecker, *supra* note 68, at 133.

claims being made.⁷² Additionally, the lack of comparable levels of press about other energy alternatives may make positive claims about tar sands, however misleading they might be, seem more compelling to the average reader. Finally, all people have a huge stake in knowing the truth about tar sands because of the direct link between tar sand development, a fossil fuel, and climate change. On this point, European Union Parliament members emphasized the importance of getting clear information to the European public about the environmental consequences of using tar sands as a fuel source. The members asked the Commission to ensure that tar sands oil imports are held to “rigorous and transparent scrutiny so that consumers can decide if tar sands oil is worth the high cost in greenhouse gas emissions, air pollution, water pollution, wildlife habitat destruction, and destruction of . . . forests and wetlands.”⁷³

III. LEGAL ANALYSIS OF FALSE AND MISLEADING ADVERTISING

Sierra Club Canada’s criticism of the Canwest ads has been echoed by many commentators of other tar sands publicity campaigns. Commentators have uniformly castigated companies of falsely selling tar sands as a “cleaner alternative” to conventional oil.⁷⁴ Greenpeace Canada

⁷² Kelly Crandall, Comment, *Trust and the Green Consumer: The Fight for Accountability in Renewable Energy Credits*, 81 U. COLO. L. REV. 893, 949 (2010).

⁷³ Susan Casey-Lefkowitz, *Europeans Say No to Tar Sands Oil*, SWITCHBOARD (Apr. 20, 2010), http://switchboard.nrdc.org/blogs/sclefkowitz/europeans_say_no_to_tar_sands.html; Letter from Members of the European Parliament to Comm’r Connie Hedegaard (Apr. 20, 2010), available at http://switchboard.nrdc.org/blogs/sclefkowitz/media/2010%2004%20Hedegaard_FQD_final.pdf.

⁷⁴ Martin Hickman, *Shell Rebuked for ‘Greenwash’ Over Ad for Polluting Oil Project*, THE INDEPENDENT, Aug. 13, 2008, <http://www.independent.co.uk/environment/green-living/shell-rebuked-for-greenwash-over-ad-for-polluting-oil-project-892863.html>; Kirsten Korosec, *Operation Greenwash: Oil Sands Sells Itself as the Cleaner Alternative*, BNET, May 19, 2010, <http://www.bnet.com/blog/clean-energy/operation-greenwash-oil-sands-sells-itself-as-the-cleaner-alternative/1808>; Chris MacDonald, *supra* note 39; Erich Pica, *The Attempted Corporate Greenwash of Canada’s Dirty Tar Sands*, HUFFINGTON

characterized tar sands stakeholders like the Canadian Association of Petroleum Producers and the Alberta government of waging “spin campaigns” in direct response to public pressure for truth about the destructive tar sands developments.⁷⁵

However, it is unclear to what extent tar sands advertisements could be challenged by legal means in the United States. Therefore, this section will use the Canwest ads as a hypothetical test case to examine whether these allegedly deceptive ads cross the boundary into legal deception⁷⁶ under US law.

Generally speaking, in order for the US government to regulate how an oil company disseminates its message about tar sands, the government must first determine whether the content is “commercial” or “noncommercial” speech. This distinction is important because it impacts the standard of review for speech regulations. If the content is considered commercial speech, the government must determine if the speech is false or misleading; commercial speech that is false or misleading “may be prohibited entirely.”⁷⁷ If the commercial speech is not false or misleading, courts will then apply the “Central Hudson Test” to assess whether a regulation restricting commercial speech is constitutional under the First Amendment.⁷⁸

A. Constitutional Protection of Commercial Speech

The US Supreme Court’s definition of commercial speech has ranged from a narrow definition, speech that “does no more than propose a

POST, Mar. 1, 2010, http://www.huffingtonpost.com/erich-pica/the-attempted-corporate-g_b_480888.html.

⁷⁵ Hudema, *supra* note 39.

⁷⁶ See Terry Tamminen, *Green Fraud Is Even More Harmful Than Greenwashing*, GRIST, Oct. 9, 2010, <http://www.grist.org/article/green-fraud>.

⁷⁷ *In re R. M. J.*, 455 U.S. 191, 203 (1982).

⁷⁸ *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 563 (1980).

commercial transaction,⁷⁹ to a more formal definition, “expression related solely to the economic interests of the speaker and its audience.”⁸⁰ The US Supreme Court originally held that the First Amendment protected free speech of commercial messages in *Bigelow v. Virginia*.⁸¹ The Court further laid out the rationale in *Virginia Pharmacy Board v. Virginia Consumer Council*, in which it struck down a state law that banned the advertising of prescription drug prices because the free flow of commercial information was important for allowing “the formation of intelligent opinions as to how [the free enterprise system] ought to be regulated or altered.”⁸²

Still, the Court has identified general characteristics of commercial speech that justify granting it less protection under the First Amendment than noncommercial speech. For example, commercial speech is less likely to be chilled by proper regulation; the rationale is that a commercial speaker can better verify the truth of its commercial speech because the content is likely to be about its own product or service, which the commercial speaker “presumably knows more about than anyone else.”⁸³ The commercial speaker is also more motivated to persist through the burdens of complying with regulations because of the profit motive underlying its commercial speech.⁸⁴ For these reasons, the Court in *Virginia Pharmacy Board v. Virginia Consumer Council* concluded that some restriction on commercial speech was constitutional; it was “appropriate to require that a commercial

⁷⁹ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 776 (1976).

⁸⁰ *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561.

⁸¹ *Bigelow v. Va.*, 421 U.S. 809, 825 (1975) (noting that it was error to assume “that advertising, as such, was entitled to no First Amendment protection.”).

⁸² *Va. Pharmacy Bd.*, 425 U.S. at 765.

⁸³ *Id.* at 772 n.24.

⁸⁴ *Id.*; *Friedman v. Rogers*, 440 U.S. 1, 10 (1979) (noting that the strong link between commercial speech and business profits makes the advertiser’s message “carefully calculated” for the purpose of producing profits and therefore “less likely than other forms of speech to be inhibited by proper regulation.”).

message appear in such a form . . . as [is] necessary to prevent its being deceptive.”⁸⁵

Under the First Amendment, certain commercial speech can be prohibited if it is actually or inherently misleading.⁸⁶ While the First Amendment protects false statements in the political context because restricting false speech may lead to self-censorship to the detriment of public debate,⁸⁷ the Court has not found that this justification applies to commercial speech. If commercial speech is only potentially misleading, however, it cannot be completely banned “if narrower limitations can ensure that the information is presented in a non-misleading manner.”⁸⁸ An example of a narrower limitation is a requirement that the commercial message “appear in such a form, or include such additional information, warnings, and disclaimers, as are necessary to prevent its being deceptive.”⁸⁹

*B. Determining if the Content of a Particular Advertisement Is
“Commercial Speech”*

1. US Supreme Court Case Law

Whether the content of an advertisement is commercial or noncommercial speech is important because it determines the standard of review for restrictions imposed on that speech. Applied to this article, the categorization would dictate to what extent the government could control the speech in tar sands advertisements. Noncommercial editorial speech receives full protection under the First Amendment, so content-based regulation of noncommercial editorial speech must withstand strict

⁸⁵ *Friedman*, 440 U.S. at 10.

⁸⁶ *Kasky v. Nike, Inc.*, 45 P.3d 243, 252 (2002).

⁸⁷ *Id.* at 251.

⁸⁸ *Ibanez v. Fla. Dep’t. of Bus. and Prof’l Regulation, Bd. of Accountancy*, 512 U.S. 136, 153 (1994).

⁸⁹ *Kasky*, 45 P.3d at 252.

scrutiny.⁹⁰ Commercial speech receives lower First Amendment protection; legislative attempts to regulate the content of commercial speech undergo a lower, intermediate level of scrutiny, as described in *Central Hudson Gas & Electrical Corp. v. Public Service Commission*.⁹¹

The US Supreme Court, however, has not provided a clear test for determining whether an advertisement constitutes commercial speech or noncommercial speech, or both. In *Bolger v. Young's Drug*, the Court examined whether the First Amendment protected a corporation's unsolicited "informational pamphlets."⁹² The pamphlets discussed the general desirability and availability of contraceptives, but they also referred to specific contraceptives sold by the corporation.⁹³ The Court decided that the fact that an advertisement was paid for does not automatically make it commercial speech because advertisements can convey messages unconnected to a product, service, or commercial transaction.⁹⁴ However, the Court also stated that advertising that "links a product to a current public debate," such as the desired level of accessibility of birth control, is "not thereby entitled to the constitutional protection afforded noncommercial speech. . . . Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues."⁹⁵

The Court then discussed three factors that, when combined, supported characterizing speech as commercial: concession by the publisher that the publication was an advertisement, reference to a specific product, and

⁹⁰ *Pac. Gas & Elec. Co. v. Public Util. Comm'n of Cal*, 475 U.S. 1 (1986).

⁹¹ *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980). A restraint on commercial "communication [that] is neither misleading nor related to unlawful activity" is subject to an intermediate level of scrutiny, and suppression is permitted whenever it "directly advances" a "substantial" governmental interest and is "not more extensive than is necessary to serve that interest." *Id.* at 573.

⁹² *Bolger v. Young's Drug Prod.*, 463 U.S. 60, 67 (1983).

⁹³ *Id.* at 62.

⁹⁴ *Kasky*, 45 P.3d at 254.

⁹⁵ *Bolger*, 463 U.S. at 67–68.

economic motivation.⁹⁶ The fact that the pamphlet involved all three of these categories was “strong support” for the conclusion that the speech was commercial.⁹⁷ These factors, however, did not definitively demarcate commercial from noncommercial speech.

The Court has applied a special analysis when commercial speech in an advertisement was inseparable from noncommercial speech, or “inextricably intertwined.” When an advertisement involves commercial and noncommercial speech that are “inextricably intertwined,” the level of First Amendment scrutiny applied depends on “the nature of the speech taken as a whole and the effect of the compelled statement thereon.”⁹⁸ In *Riley v. National Federation of the Blind*, the Court reviewed the constitutionality of a content-based state law that required charitable solicitations to make a particular disclosure.⁹⁹ Part of the law required that, before soliciting donations, professional fundraisers must disclose the percentage of charitable contributions over the past year that was actually turned over to the charity.¹⁰⁰ The Court found that the required statement was “commercial speech” and that it was “inextricably intertwined” with “informative and perhaps persuasive speech” that is noncommercial.¹⁰¹ Rather than try to parcel out the commercial speech from the noncommercial speech and apply different standards to each, the Court treated the solicitation as a whole as fully protected, noncommercial speech.¹⁰² However, the decision was not so broad as to hold that speech containing both commercial and noncommercial elements can be treated as wholly noncommercial speech.

⁹⁶ *Id.* at 66–67.

⁹⁷ *Id.* at 67.

⁹⁸ *Riley v. Nat’l Fed’n of the Blind of N. C., Inc.*, 487 U.S. 781, 796 (1988).

⁹⁹ *Id.* at 784.

¹⁰⁰ *Id.* at 795.

¹⁰¹ *Id.* at 796; *Bd. of Tr., State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) (stating that the commercial speech in *Riley* “was ‘inextricably intertwined’ because the state law required it to be included.”).

¹⁰² *Riley*, 487 U.S. at 796.

In *Board of Trustees, State University of N.Y. v. Fox*, the Court clarified that commercial and noncommercial speech is only “inextricably intertwined” if it is impossible to state one without involving the other, as was the case in *Riley*, where the statute required certain commercial speech to be made.¹⁰³ Therefore, it seems that some noncommercial discussion of public issues is not enough, in itself, to make the advertisement entitled to the full constitutional protection.¹⁰⁴

2. California Supreme Court Law: the *Kasky v. Nike* Test

The US Supreme Court has yet to resolve the uncertain boundary between commercial and noncommercial speech. The closest it has come was in 2002, when it granted, but subsequently dismissed, certiorari on *Kasky v. Nike*, a case in which the Supreme Court of California held that public discussion of business operations should be treated as commercial speech.¹⁰⁵ Although *Kasky* is not binding outside of California, the Supreme Court of California’s reasoning in that case may influence how other courts analyze advertisements with ambiguous commercial/noncommercial character, such as tar sands advertisements like the Canwest ads.

In *Kasky*, the Supreme Court of California addressed whether the Nike Corporation’s statements about its labor practices constituted commercial or noncommercial speech.¹⁰⁶ Nike was under fire by the media for allegedly allowing harmful labor practices in its factories in Asia, including violating minimum wage, occupational health and safety, and environmental

¹⁰³ *Fox*, 492 U.S. at 474 (discussing presentations that combined sale of housewares with teaching of home economics, the noncommercial speech was not inextricable from commercial speech because “[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.”).

¹⁰⁴ *Id.* at 475.

¹⁰⁵ *Kasky v. Nike, Inc.*, 45 P.3d 243 (2002), *cert. granted*, 537 U.S. 1099, and *cert. dismissed*, 539 U.S. 654 (2003).

¹⁰⁶ *Id.*

protection laws and regulations.¹⁰⁷ In response, Nike issued press releases, mailed letters to university presidents and directors of athletic departments, and released full-page newspaper advertisements.¹⁰⁸ These documents made statements that refuted the allegations about factory working conditions and claimed Nike was fully complying with the law.¹⁰⁹ Kasky, a California citizen,¹¹⁰ sued Nike under state unfair competition and false advertising laws, alleging that the statements made to the California public were “false and misleading.”¹¹¹

In evaluating Kasky’s claim, the Supreme Court of California formulated a test to determine whether speech is commercial when assessing compliance with the state’s false advertising or other commercial deception laws. The court explicitly cautioned that it was not purporting to make a test to distinguish commercial from noncommercial speech that would apply outside the scope of the state laws.¹¹² Under this caveat of the test’s limited applicability, the court stated that three elements must be present for speech to be considered commercial: a speaker that is commercial, an intended commercial audience, and representations of a fact of a commercial nature.¹¹³ In the context of regulation of false or misleading advertising, examples of “representations of a fact of a commercial nature” include representations “made for the purpose of promoting sales of, or other commercial transactions in, the speaker’s products or services.”¹¹⁴

¹⁰⁷ *Id.* at 247–48.

¹⁰⁸ *Id.* at 248.

¹⁰⁹ *Id.*

¹¹⁰ California law allows “any person acting or the interests of . . . the general public” to bring an action under the CAL. BUS. & PROF. CODE § 17000 or under state false advertising law (CAL. BUS. & PROF. CODE § 17204).

¹¹¹ *Kasky*, 45 P.3d at 248.

¹¹² James J. Barney, *The Mixed Message: The Supreme Court’s Missed Opportunity to Address the Confused State of Commercial Speech in Nike, Inc. v. Kasky?*, 37 UWLA L. REV. 1, 3 (2004).

¹¹³ *Kasky*, 45 P.3d at 258–59.

¹¹⁴ *Id.* at 256.

Nike made two unsuccessful arguments that its allegedly false and misleading statements should be protected as noncommercial speech. First, it claimed that its speech was wholly noncommercial because it was made as part of a “matter of public interest and public debate”¹¹⁵ through its discussion of noncommercial issues, such as the degree to which domestic companies should be responsible for working conditions abroad.¹¹⁶ To the contrary, the court found that some portions of Nike’s statements that described the actual conditions and practices in Nike factories were commercial because evidence showed that Nike intended those descriptions to serve to maintain its sales and profits.¹¹⁷ Second, the court applied the US Supreme Court’s reasoning from *Board of Trustees* to reject the argument that the commercial elements of Nike’s press releases and letters were “intertwined” with the noncommercial speech elements so as to categorize the speech as noncommercial.¹¹⁸

Ultimately, the court concluded that Nike’s publicity statements defending its labor practices and working conditions constituted commercial speech for purposes of applying state law.¹¹⁹ The statements satisfied the three elements of the court’s new limited-purpose test: first, as a seller of athletic shoes and apparel, it was undisputed that Nike satisfied the first element of being a commercial speaker.¹²⁰ Second, the court found the press releases and letters to newspaper editors had an “intended commercial audience” despite being addressed to the public in general, because of evidence that Nike intended to reach and influence actual and potential purchasers of Nike’s products.¹²¹ Nike’s letters to university presidents and directors of athletic departments also met the element of “an

¹¹⁵ *Id.* at 259.

¹¹⁶ *Id.* at 260.

¹¹⁷ *Id.* at 258.

¹¹⁸ *Id.* at 260.

¹¹⁹ *Id.* at 262.

¹²⁰ *Id.* at 258.

¹²¹ *Id.*

intended commercial audience” because university athletic departments are major purchasers of athletic shoes and apparel.¹²² Finally, the court found Nike’s statements fulfilled the third element of containing representations of fact of a commercial nature.¹²³ Nike’s descriptions of its labor policies, practices, and conditions in its factories were commercial because they were “factual representations about its own business operations.”¹²⁴ Therefore, the court held that Nike’s speech was subject to regulation under state false advertising and deceptive practice law.¹²⁵

C. Application: Would the Canwest Ads Be Considered Commercial Speech?

If the Canwest ads or substantially similar tar sands ads were released in the United States, the extent to which they could be regulated depends on how US courts characterize them as commercial speech. Regulation is more likely to succeed if a court found the advertisements merely link the tar sands product to current debate and thus do not deserve protection as noncommercial speech. Unlike the Supreme Court of California, however, the US Supreme Court tends to err in favor of not inadvertently suppressing speech that deserves greater constitutional protection.¹²⁶ If the court were to apply *Riley* and find the commercial and noncommercial elements are “inextricably intertwined,” it could treat the entire advertisement as noncommercial speech fully protected under the First Amendment.¹²⁷ Recalling that the Court has stated that commercial and noncommercial messages are “inextricable” if it is impossible to state one without involving the other,¹²⁸ an argument exists that Shell’s commercial representations

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 259.

¹²⁶ *Bolger v. Young’s Drug Prod.*, 463 U.S. 60, 66 (1983).

¹²⁷ *See, e.g., Riley v. Nat’l Fed’n of the Blind of N. C., Inc.*, 487 U.S. 781, 796 (1988).

¹²⁸ *Bd. of Tr., State Univ. of N.Y. v. Fox*, 492 U.S. 469, 474 (1989) (discussing presentations that combined sale of housewares with teaching of home economics and

about its manufacturing practices were “inextricably intertwined” with the noncommercial elements of the advertisements. Shell could argue there was no way it could have discussed the public policy problem of how to cleanly process tar sands without discussing its own technological strategies for doing so.

If the advertisements had been published in California, however, *Kasky* suggests there is a good chance they would be classified as commercial speech that could be regulated under California’s unfair competition and false advertising laws. The Canwest ads share several general similarities to Nike’s publications in *Kasky*. The ads make claims about how Shell is manufacturing its product, and Shell makes these claims in the defensive posture of “busting myths.” The Canwest ads are also similar to Nike’s statements because their content involves at least one issue of public debate: whether the tar sands industry has an environmentally harmful impact.

The Canwest ads appear to fulfill the three elements of the limited-purpose test: a speaker that is commercial, an intended commercial audience, and representations of fact of a commercial nature. Shell, like Nike, acted as a commercial speaker because it manufactured and distributed petroleum, a consumer good. Also like Nike, Shell published its advertisements in a newspaper to the general public, which the *Kasky* court found could be a “commercial audience” because they are all actual and potential purchasers, as long as Shell’s intent could be established. Finally, the statements made were commercially related. Shell’s statements in the advertisements that it “contain[s] all the process water and rain water on our sites to make sure they don’t flow into the river” and that “energy-reduction measures are a key focus for technological investment at Shell” are both factual representations about its business operations that Shell

finding that the noncommercial speech was not inextricable from commercial speech because “[n]o law of man or of nature makes it impossible to sell housewares without teaching home economics, or to teach home economics without selling housewares.”).

likely intended to appeal to environmentally conscious consumers and therefore help “maintain and/or increase its sale and profits.”¹²⁹

As discussed earlier, satisfying the limited-purpose test from *Kasky* only classifies speech as commercial for purposes of applying California law related to false advertising or commercial deception; however, the US Supreme Court should adopt California’s reasoning and treat advertisements with mixed commercial and noncommercial characteristics, like Shell’s, as commercial speech that can be regulated for deceptive content. This would fall in line with *Bolger* because Shell’s “informational specials” share characteristics with the “informational pamphlets” the US Supreme Court considered in that case. While Shell might argue it has a noncommercial motive of simply giving the public information about tar sands, this motive is undermined by Shell’s strong commercial interest in having the ads foster the growth of its tar sands business by presenting a green appearance of its operations. Also, like the pamphlets in *Bolger*, the Canwest advertisements mention the manufacturing processes that Shell was using for its own product: “[d]espite the fact oil sands have been leaching naturally into the river for the past 10,000 years, Shell ensures its operations don’t add a drop to that.” In this sense, the messages in the advertisements are commercial speech because they refer specifically to tar sands processed by Shell. A court ought to find that such a statement amounts to merely “link[ing] a product to a current public debate” about the environmental impact of tar sands, and therefore find the speech is commercial under the *Bolger* rationale that Shell “should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues.”¹³⁰

¹²⁹ See *Kasky*, 45 P.3d at 258.

¹³⁰ *Bolger*, 463 U.S. at 67–68.

*D. Determining What Commercial Speech the Government May Regulate:
Is There a Legitimate State Interest?*

In the case that the content of the Canwest ads is classified as commercial speech, the “Central Hudson test” would apply to determine whether a law could permissibly regulate its content.¹³¹ Under that test, commercial speech must concern lawful activity and not be misleading.¹³² If that is the case, a court will then assess whether the asserted governmental interest in regulating the speech is substantial. If so, the regulation is valid if it passes intermediate scrutiny: that is, if the regulation directly advances the governmental interest asserted and is not more extensive than necessary.¹³³

The Supreme Court gave guidance on whether speech is misleading in *Bates v. State Bar of Arizona*.¹³⁴ In *Bates*, the Court considered whether First Amendment protection to commercial speech barred the government from banning lawyers from price advertising for “routine” services.¹³⁵ Although the Court found this advertising was not necessarily or inherently misleading and therefore could not be banned entirely, it explained how advertising for professional services could present “possibilities for deception”: “the public’s comparative lack of knowledge, the limited ability of the professions to police themselves, and the absence of any standardization in the ‘product’” were factors that make the public especially susceptible to abuses that states have a legitimate interest in controlling.¹³⁶ Under such circumstances where advertising is deceptive, states could regulate the advertisement’s content.¹³⁷

Many of the Court’s concerns about the legal advertising mentioned in *Bates* exist in the context of advertising about tar sands. In *Bates*, the Court

¹³¹ *Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977).

¹³⁵ *Id.*

¹³⁶ *In re R. M. J.*, 455 U.S. 191, 202 (1982) (discussing *Bates*).

¹³⁷ *Id.*

explained that “because the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising[;] . . . [f]or example, advertising claims . . . [are] not susceptible of measurement or verification.”¹³⁸ Under such circumstances, the Court left open the possibility that “some limited supplementation, by way of warning or disclaimer or the like, might be required . . . so as to assure [*sic*] that the consumer is not misled.”¹³⁹ Similar to how legal advertising poses special risks to the public because the public has a disadvantaged ability to verify the claims attorneys make about their services, the tar sands industry has a clear advantage over the public regarding the environmental impact of tar sands and the ability of industry to minimize that damage. This has been particularly true for the Albertan tar sands because the Canadian government has taken a laissez-faire approach to enforcing regulation.¹⁴⁰ In at least one press report released by the Albertan government, a reporter has accused the government of not citing truly independent scientific studies

¹³⁸ *Bates*, 433 U.S. at 383.

¹³⁹ *Id.* at 384.

¹⁴⁰ Editorial, *Citizen Scientists: Scientists should speak out on the environmental effects of ventures such as tar-sands mining*, 468 NATURE, Nov. 24, 2010, <http://www.nature.com/nature/journal/v468/n7323/full/468476a.html> (“It would be unrealistic to expect that we could harvest fossil fuels or minerals without an effect on the environment. No form of mining is clean. But the fast development of the tar sands, combined with weak regulation and a lack of effective watchdogs, have made them an environmentalist’s nightmare. . . . The provincial Albertan government is seemingly more progressive than the federal Canadian government in its climate-change plan . . . [b]ut many of these rules are weaker than they seem. A boom in production will still see overall emissions go through the roof. Only a single 1 km² plot has been certified as reclaimed so far in more than 600 km² of mining area. A long-promised Alberta land-use framework, which would set limits on development, has yet to be completed. And of five mining operations that have had their plans for dealing with tailings ponds evaluated, just two met directives. The other three were granted grace periods extending to 2018 to sort out their mess.”); Hudema, *supra* note 39.

from which the public can assess the tar sands' environmental impact.¹⁴¹ In at least this aspect, consumers are vulnerable to being misled, and therefore regulation is permissible and necessary to protect them from confusing or deceptive advertising.

E. Potential Means of Regulation: FTC's General Power to Regulate Deceptive Advertising

The Federal Trade Commission (FTC) has a general power to regulate advertising under Section 5 of the FTC Act, which prohibits entities from engaging in unfair or deceptive acts or practices in interstate commerce.¹⁴² To fall under Section 5 of the FTC Act, an advertisement must make a representation that is likely to mislead a consumer.¹⁴³ The FTC looks to the impression made by the advertisement as a whole,¹⁴⁴ as seen from the perspective of a consumer acting reasonably under the circumstances.¹⁴⁵ Second, the representation, omission, or practice must be "material." It is material if the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service.¹⁴⁶ Aside from express representations, which are always considered material,¹⁴⁷ the FTC has found other claims to be material when they concern the purpose, safety, efficacy, or cost of the product or service.¹⁴⁸ Otherwise, the FTC may require evidence that the claim or omission is likely to be considered important by consumers, such as evidence that a particular feature adds a

¹⁴¹ Susan Casey-Lefkowitz, *Studies Confirm Tar Sands Dirtiest of Dirty Oils*, SWITCHBOARD, July 23, 2009, http://switchboard.nrdc.org/blogs/sclefkowitz/studies_confirm_tar_sands_dirt.html.

¹⁴² 15 U.S.C. § 45 (2006).

¹⁴³ Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to John D. Dingell, Chairman, Comm. on Energy & Commerce (Oct. 14, 1983), *available at* <http://www.ftc.gov/bcp/policystmt/ad-decept.htm> [hereinafter FTC Policy Statement].

¹⁴⁴ *Am. Home Prods. v. F.T.C.*, 695 F.2d 681, 688 (1982).

¹⁴⁵ FTC Policy Statement, *supra* note 143.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

higher cost to the product than a comparable product without the feature or consumer survey data.¹⁴⁹

In addition to investigating the truth of claims made in advertising, the FTC investigates whether the claims are “substantiated” or adequately supported.¹⁵⁰ An unsubstantiated claim can be the sole basis for filing an action against an advertisement, even if it did not cause consumer confusion.¹⁵¹ Different types of claims require different standards of substantiation. If the claims concern health, safety, or product efficacy, the standard is “competent and reliable scientific evidence,” meaning “tests, studies or other research based on the expertise of professionals in the field who have been objectively conducted and evaluated by qualified people using procedures that give accurate and reliable results.”¹⁵² However, environmental claims do not have to be supported as strongly. According to the FTC’s Green Guides, at the time a party makes an express or implied claim about an environmental attribute of a product, package, or service, the party must “possess and rely upon a reasonable basis substantiating the claim. A reasonable basis consists of competent and reliable evidence,” which is evidence based on the expertise of professionals in the relevant area, conducted and objectively evaluated by qualified persons using procedures generally accepted in the profession to yield accurate and reliable results.¹⁵³

However, advertisers may defend against a suit under the FTC Act by claiming the disputed claims consist of non-actionable “puffery,” which are

¹⁴⁹ *Id.*

¹⁵⁰ LEWIS ROSE & D. REED FREEMAN, JR., ADVERTISING LAW GUIDE ¶ 110 (2011).

¹⁵¹ *Id.*

¹⁵² Lesley Fair, *Substantiation: The Science of Compliance*, BUREAU OF CONSUMER PROTECTION, <http://business.ftc.gov/documents/substantiation-science-compliance> (last visited Apr. 22, 2012).

¹⁵³ Guides for the Use of Environmental Marketing Claims, 75 Fed. Reg. 63552 (Oct. 15, 2010) (to be codified at 16 C.F.R. pt. 260.5), *available at* <http://www.ftc.gov/bcp/grnrule/guides980427.htm#260.5> (last visited Apr. 22, 2012).

representations that ordinary consumers do not take seriously.¹⁵⁴ Claims are considered “puffery” if they are “either vague or highly subjective and, therefore, incapable of being substantiated.”¹⁵⁵ General nonfactual claims are likely to be considered puffery “so long as any lack of veracity behind such claims is not harmful.”¹⁵⁶ A claim about a good is no longer “puffery,” however, if it assigns benefits to the good that the good does not actually possess.¹⁵⁷

F. Application: Applying the FTC Act to the Canwest Ads

Under the FTC Act, the FTC could find, under the first step of the analysis, that the Canwest ads made a representation “likely to mislead” the consumer. There are two potential misrepresentations in the advertisements. The FTC could evaluate the content of the claims within the ads, such as the statement that “Shell ensures its operations don’t add a drop” to natural tar sands leaching. Alternatively, the FTC could find that the presentation of the advertisements is deceptive because they are formatted like informative articles. The Canadian Code of Advertising Standards similarly prohibits advertisements from being “presented in a format or style that conceals its commercial intent,”¹⁵⁸ and it was under this clause that the Sierra Club filed

¹⁵⁴ “[T]here is a category of advertising themes, in the nature of puffing or other hyperbole, which do not amount to the type of affirmative product claims for which either the Commission or the consumer would expect documentation.” *In re Pfizer, Inc.*, 81 F.T.C. 23, 92 (1972). The counter-argument to this assertion is that “[i]f puffery were as inconsequential as the puffery doctrine holds it to be, then profit-maximizing corporations would not engage in it—firms that wasted money on it would be quickly subsumed by those that did not. And, sure enough, empirical evidence reveals that advertising conventionally categorized as “puffery” does indeed influence the behavior of ordinary consumers.” David G. Yosifon, *Resisting Deep Capture: The Commercial Speech Doctrine and Junk-food Advertising to Children*, 39 LOYOLA OF L.A. L. REV. 507, 533 (2006).

¹⁵⁵ *F.T.C. v. Nat’l Urological Group, Inc.*, 645 F. Supp. 2d 1167, 1205 (N.D. Ga. 2008).

¹⁵⁶ Coppolecchia, *supra* note 45, at 1380.

¹⁵⁷ *Nat’l Urological Group, Inc.*, 645 F. Supp. at 1205–06.

¹⁵⁸ *The 14 Clauses of the Canadian Code of Advertising Standards*, ADVERTISING STANDARDS CANADA,

a complaint with Advertising Standards Canada, an independent advertising self-regulatory body. The complaint asserted that the advertisements were “presented in a format or style which conceals its commercial intent.”¹⁵⁹ The Executive Director of Sierra Club Canada also argued that Shell had made “[n]o attempt . . . to point out to the reader that these ‘information features’ are paid advertisements”¹⁶⁰ and that trying to disguise the advertisements in a way that would make the public believe they were articles unfairly “play[ed] on public complacency” about climate change.¹⁶¹ Because the FTC looks to the impression made by an advertisement as a whole,¹⁶² as seen from the perspective of a consumer acting reasonably in the circumstances,¹⁶³ it is possible the FTC could similarly find that the editorial-like formatting of the advertisements was enough to have likely misled consumers into thinking they were objectively written articles.

It is less clear whether, under the second step of the analysis, the FTC would find that the claims in the Canwest ads were “material” representations. On one hand, claiming that it is a “myth” that “oil sands production is too energy-intensive” and that tar sands “are polluting the Athabasca River” are both material claims and express claims (that oil sands productions are *not* too energy-intensive and that they are *not* polluting the Athabasca River). On the other hand, recalling that the FTC’s definition of “material representation” is one “likely to affect a consumer’s choice or conduct regarding the product or service,”¹⁶⁴ the FTC might find the representations are not material because it is not clear that they could influence consumer purchasing behavior. The most obvious way a

<http://www.adstandards.com/en/standards/the14Clauses.aspx#disguised> (last visited Apr. 22, 2012).

¹⁵⁹ *Disguised Advertising*, *supra* note 60.

¹⁶⁰ *Id.*

¹⁶¹ Delisle, *supra* note 67.

¹⁶² *Am. Home Prods. v. F.T.C.*, 695 F.2d 681, 688 (1982).

¹⁶³ FTC Policy Statement, *supra* note 143.

¹⁶⁴ *Id.*

consumer can use his or her “choice or conduct” regarding tar sands would be to decide which brand of gasoline to buy. According to the environmental nonprofit organization ForestEthics, in 2010, fifteen of 150 refineries in the United States used petroleum from tar sands.¹⁶⁵ However, supposing that consumers wanted to avoid fuel sourced from tar sands, they are unlikely to know whether the fuel at their local gas stations originated from tar sands. In certain geographical areas, they may have no choice other than to use fuel refined from tar sands. For example, although Whole Foods successfully avoided fuel from tar sands at nine out of ten of its distribution centers in 2010, even with the informational and economic advantages that come from being a large corporation, it had “no alternative source” to tar sands in the Rocky Mountain region.¹⁶⁶

Depending on how the claims in the ads are classified, the FTC could find that the ads violate the FTC Act because they lack sufficient evidence. Shell could argue that the claims related solely to the environmental attributes of tar sands, and therefore only required “a reasonable basis substantiating the claim” to satisfy the sufficient evidence requirement. However, the claims could also arguably be classified as relating to safety and efficacy because of the health risks implicated by tar sands production and transportation. Shell would then need to meet the higher standard of competent and reliable scientific evidence.

Even if the ads satisfy the elements of being misleading and material or lacking substantial evidence, the ads would not be deceptive under the FTC Act if the FTC finds the claims are “puffery.” In particular, the FTC may consider the statement that it is a “[m]yth . . . [that] [o]il sands production is

¹⁶⁵ Mitch Potter, *Tar Sands Snubbed By ‘Green’ Retailers*, THESTAR.COM, Feb. 11, 2010, <http://www.thestar.com/news/canada/article/763791--tar-sands-snubbed-by-green-retailers>.

¹⁶⁶ Whole Foods moved to avoid unprocessed petroleum from the tar sands at its ten US distribution centers, but this was easier said than done; according to their spokeswoman in 2010, fuels derived from Alberta oil sands continue to power Whole Foods trucks “in the Rocky Mountain region because as of now there is no alternative source.” *Id.*

too energy-intensive” as nothing more than an expression of opinion not made as representation of fact and therefore too subjective to require substantiation.¹⁶⁷ In the most recent revision of the Green Guides, the FTC declined to include claims regarding “sustainability” because of evidence that consumers did not perceive the term to contain one single environmental meaning.¹⁶⁸ The Green Guides do not specifically address the term “energy-intensive,” but the term should be distinguished from “sustainability” and therefore require substantiation. Unlike “sustainability,” which can be applied in a wide variety of contexts and suggests a situation-specific balancing of different interests, “energy-intensive” is more likely to be perceived by consumers as having a single meaning of consuming a high quantity of energy.

As an alternative to challenging the Canwest ads on the basis of their content, it is possible that the FTC could regulate the Canwest ads on the basis of their being deceptively formatted as newspaper articles. This claim initially seems more promising considering that “disguised advertising techniques,” not the content of the ads, was the basis of Sierra Club Canada’s complaint to the Canadian Advertising Standards Board.¹⁶⁹ However, it may be more difficult to establish the materiality of a misleading format than to establish the materiality of specific assertions. The FTC might require extrinsic evidence that consumers would likely have formed different opinions about tar sands depending on whether they knew the information was presented by a paid advertisement or by an independent newspaper article.

Overall, while the viability of a suit under the FTC Act would clearly depend on the details of the specific advertisement, the main obstacles to

¹⁶⁷ Burton, *Climate Change*, *supra* note 65.

¹⁶⁸ FED. TRADE COMM’N, PROPOSED REVISIONS TO THE GREEN GUIDES 127 (2010), available at

<http://www.ftc.gov/os/fedreg/2010/october/101006greenguidesfrn.pdf>.

¹⁶⁹ *Disguised Advertising*, *supra* note 60.

regulating ads like the Canwest ads would likely be the materiality requirement and the puffery defense. It might be difficult to establish that a representation is likely to affect a consumer's choice or conduct and is therefore "material" because consumers may not have the means or ability to make that choice. The puffery defense is also challenging to overcome because of the inherently unclear boundary of what "ordinary consumers do not take seriously"¹⁷⁰ coupled with the absence of comprehensive, binding standards from the FTC for substantiating terms in environmental claims. These uncertainties make it prudent to seek a legal alternative to the FTC Act for challenging allegedly deceptive tar sands advertisements.

IV. REGULATION OF TAR SANDS ADVERTISEMENTS AS ADVERTISEMENTS OF POTENTIALLY HAZARDOUS COMMODITIES

Another potential avenue for regulating claims in advertisements about tar sands is to pass new legislation for doing so. Tar sands are analogous to other heavily regulated products that potentially harm human health and safety, such as tobacco, alcohol, and prescription drugs, which also have statutory restrictions on their marketing. For example, the Federal Alcohol Administration Act prohibits advertisements of distilled spirits from containing "any statement that is false or untrue in any material particular, or that, irrespective of falsity, directly, or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific or technical matter tends to create a misleading impression."¹⁷¹

While the concerns surrounding the tar sands may not implicate the health and safety of individuals as directly as commodities like tobacco and alcohol, lawmakers should defer to the fact that conclusive data on these issues have not yet been collected. As seen in Alberta, tar sands operations negatively impact surrounding populations by consuming or polluting precious natural resources like water. On a broader scale, the potential for

¹⁷⁰ FTC Policy Statement, *supra* note 143.

¹⁷¹ 27 C.F.R. § 5.65 (2006).

the extraction and processing of tar sands to exacerbate climate change implicates the well being of all humans, which studies have shown can be dramatically affected by shifts in climate.¹⁷² Therefore, there is a legitimate concern in preventing advertisers from misrepresenting tar sands as less harmful than they actually are, especially to individuals who need to make informed decisions before they agree to have the pipelines or mining operations enter their communities.

As suggested in part III's discussion of First Amendment case law, however, the potentially detrimental effect of a particular communication on the health of an individual or population is not, in and of itself, considered a legitimate basis for governmental suppression of commercial speech.¹⁷³ Since *Central Hudson*, the US Supreme Court explicitly stated that legislatures do not have any greater latitude for regulating speech that promotes socially harmful activities than for other speech.¹⁷⁴ For example, in *Lorillard Tobacco v. Reilly*, the Massachusetts Attorney General sought to prohibit smokeless tobacco or cigar advertising within 1,000 feet of schools or playgrounds.¹⁷⁵ The Supreme Court found the state's stated interest of preventing underage smokeless tobacco and cigar use was substantial, but there was not a reasonable fit between the means and ends of the regulatory scheme as required by *Central Hudson*.¹⁷⁶ In particular, the Court said the restriction needed to be more narrowly tailored to accommodate the legitimate First Amendment interests of tobacco retailers to convey truthful information to adults.¹⁷⁷ "as the State protects children

¹⁷² Climate Change—Health and Environmental Effects, ENVTL. PROTECTION AGENCY, <http://epa.gov/climatechange/effects/health.html> (last updated Nov. 29, 2011).

¹⁷³ *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540–53 (2001). The government generally may not prohibit communications on the basis of their content. *Boos v. Barry*, 485 U.S. 312, 322 (1988).

¹⁷⁴ *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 482 (1995).

¹⁷⁵ *Lorillard*, 533 U.S. at 561–62.

¹⁷⁶ *Id.* at 561.

¹⁷⁷ *Id.* at 564.

from tobacco advertisements, tobacco manufacturers and retailers and their adult consumers still have a protected interest in communication.”¹⁷⁸

Similarly, in *Thompson v. Western States Medical Center*, the Court struck down another advertising restriction intended to protect public health; again, it did so not because the restriction lacked a strong policy objective, but because the restriction was not narrowly tailored. Specifically, the advertising restriction in the Food and Drug Administration Modernization Act would have banned pharmacists from advertising a type of prescription drug that had not been fully tested.¹⁷⁹ Although the Court agreed that the government’s objective behind the statute was substantial and that the means chosen might directly achieve the objective, it rejected the restriction because the “interest could be satisfied by the far-less-restrictive alternative of requiring each compounded drug to be labeled with a warning that the drug had not yet undergone FDA testing and that its risks were unknown.”¹⁸⁰

The Federal Food, Drug, and Cosmetic Act, however, is an example of a law that regulates prescription drug advertising. Specifically, the Act prohibits the introduction and delivery for introduction into interstate commerce of any “misbranded” drug.¹⁸¹ Among the restrictions is the requirement that the advertisements include a “true statement of information relating to side effects, contraindications, and effectiveness.”¹⁸² Advertisements may recommend and suggest the drug only for those uses contained in the labeling:

- (a) For which the drug is generally recognized as safe and effective among experts qualified by scientific training and experience to evaluate the safety and effectiveness of such drugs; or

¹⁷⁸ *Id.*

¹⁷⁹ *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 360 (2002), *aff’d*, 238 F.3d 1090 (9th Cir. 2001).

¹⁸⁰ *Id.* at 367.

¹⁸¹ 21 U.S.C. § 331.

¹⁸² 21 C.F.R. § 202.1(3)(i).

(b) For which there exists substantial evidence of safety and effectiveness, consisting of adequate and well-controlled investigations, including clinical investigations . . . by experts qualified by scientific training and experience to evaluate the safety and effectiveness of the drug involved; . . . or

(c) For which there exists substantial clinical experience . . . on the basis of which it can fairly and responsibly be concluded by qualified experts that the drug is safe and effective for such uses.¹⁸³

Although Massachusetts did not succeed in regulating tobacco advertising in *Lorillard*, more narrowly tailored regulations might have survived because states have a similar interest in protecting the public against tobacco as they have against prescription drugs. One commentator discussed the kinds of narrowly tailored advertising regulations that a court is likely to approve: “government-mandated requirements for health warnings on tobacco packages and advertisements, the inclusion of package inserts detailing the dangers of tobacco use and available treatments and resources for quitting, and industry funding of ‘corrective’ advertising compared with laws” are potential reasonably tailored restrictions.¹⁸⁴ This assessment is consistent with the Court’s response to governmental claims that certain types of advertising will mislead consumers; when speech is potentially misleading, the remedy is to require advertisers to disclose additional information about risks.¹⁸⁵

A. Application: Potential Legislation to Regulate Tar Sands Advertising

What could legislation regulating advertisements of tar sands, or even petroleum in general, look like? Recent US Supreme Court decisions have made it difficult to predict how First Amendment protection applies to a

¹⁸³ *Id.* at § 202.1(e)(4)(ii)(a)–(d).

¹⁸⁴ U.S. DEP’T OF HEALTH & HUMAN SERVS., THE ROLE OF THE MEDIA IN PROMOTING AND REDUCING TOBACCO USE 301 (Ronald M. Davis et al. eds.), available at http://cancercontrol.cancer.gov/tcrb/monographs/19/m19_complete.pdf.

¹⁸⁵ *Id.*

health claim for which there is no conclusive proof that the claim is true or false,¹⁸⁶ but some narrowly tailored legislation has succeeded in regulating advertising of products when the governmental interest has been strong enough. Similar to harmful substances like alcohol and tobacco that have advertising restrictions, oil is a heavily regulated product. For example, federal agencies regulate petroleum-related activities such as exploration, production, and discharge, but similar restrictions are not imposed on petroleum advertising.¹⁸⁷

Because of the uncertainty about its negative environmental and health impacts, tar sands share characteristics with prescription drugs that have not been thoroughly tested and are often subjected to increased reporting requirements. While tar sands may not pose the same immediate harm to humans as a pill that is swallowed, the Lake Chippewyan studies leave open the possibility that the toxic byproducts of tar sands production can enter the human bloodstream and have potentially life-threatening results. In this way, tar sands are arguably more sinister in their manner of causing harm because victims may not be on notice of the potential danger, whereas prescription drug users often are. Prescription drugs are ultimately ingested knowingly and voluntarily, but water from a source contaminated by the tar sands industry is not.

There is also a practical argument for regulating tar sands advertisements from the ongoing debate over First Amendment protection for health-related claims in advertisements for which there is no conclusive proof. An example of such a claim would be: “tar sands production does not impact the health of surrounding communities.” In a journal article on this subject,

¹⁸⁶ David Vladeck et al., *Commercial Speech and the Public's Health: Regulating Advertisements of Tobacco, Alcohol, High Fat Foods and Other Potentially Hazardous Products*, 32 J.L. MED. & ETHICS 32, 33 (2004).

¹⁸⁷ OIL REGULATION IN 29 JURISDICTIONS WORLDWIDE 151 (Ron Deyholos ed., 2010), available at http://www.pillsburylaw.com/siteFiles/Publications/GettingTheDealThrough_OilRegulation_2010.pdf.

law professor David Vladeck observed that when a company makes a claim about a product but lacks definitive scientific evidence to verify the accuracy of the claim, industry advocates would tend to require government regulators to prove there was no “clear” evidence that the claim was accurate, while consumer protection advocates would only give the government a lower burden of proof.¹⁸⁸ The tar sands industry, like industries of other potentially hazardous products, will likely counter that the best way to solve the problem of misinformation is public education, not regulation.¹⁸⁹ However, merely increasing public education efforts on tar sands may not be enough because of the industry’s “inherent advantages in both funding and message-crafting expertise.”¹⁹⁰ Again, with reference to other hazardous products, placing some restrictions that limit “what advertisers can say, how and in what contexts their messages can be framed, and compelling disclosure of health findings related to the products being promoted” would help give members of the public a fair chance to hear both sides of the debate without overburdening advertisers’ free speech rights.¹⁹¹

To withstand legal challenges, legislation should mandate further explanation rather than ban particular content. If tobacco and prescription drug companies must explicitly disclose the health consequences of their products, it makes sense that tar sands advertisers should at least have to make the uncertainties behind certain claims more obvious. One possibility is to require claims about the environmental impact of tar sands production to be annotated, either with citations to supporting studies or with a disclaimer that indicates lack of corroboration for their claims. It should also be indicated if an advertisement made claims based on studies that were not performed by an independent source so consumers can better assess the credibility of the content.

¹⁸⁸ Vladeck, *supra* note 186, at 33.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 32.

¹⁹¹ *Id.*

The argument that the negative impact of tar sands on human health is not directly related to its consumers should not end the discussion on whether there should be any regulation of deceptive claims in tar sands advertisements. Constitutionally, there may be room for a narrowly tailored restriction in light of the interest in protecting the public against the risks associated with tar sands operations.

CONCLUSION

The controversy over the Keystone XL pipeline has helped raise awareness in the United States of the Canadian tar sands and the broader implications of relying on tar sands for oil. As that collective awareness continues to grow, it is foreseeable that stakeholders in the success of the tar sands could try to respond to concerns about the environmental and health impact of tar sands through advertising. The Canwest ads and other tar sands publicity released in Canada suggest we can expect to see materials that blur the line between advertisements and editorials. Potential means of regulating deceptive content in those advertisements include bringing an action under the FTC Act or regulating the advertisements with new legislation. New legislation could do more to protect consumers than the FTC Act by requiring companies to disclose the uncertainty of the positive claims they make in their advertisements. The complex legal terrain of First Amendment law, however, could make it challenging to craft legislation that successfully regulates tar sands advertisements.

Regardless, the legal challenges are worth taking on because the magnitude of the local and global impact of tar sands operations is still unknown. Steps should be taken to ensure the public understands the extent to which claims in advertisements about tar sands operations are unsupported. By imposing regulations on advertisements to keep the discussion fair, Congress will promote the public's interest in knowing the devastating implications to their health and the environment if those claims are wrong.